FILE COPY

SUPREME COURT

OCTOBER TERM, 1941

MILO MOORE, Director of Finance of the State of Washington, and JOHN CLARKE, Director of Game of the State of Washington,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

SMITH TROY,
Attorney General,
State of Washington.

HAROLD A. PEBBLES,
Special Assistant Attorney General,
State of Washington.

MAX CHERCH,
Special Assistant Attorney General,
State of Washington.

Attorneys for Petitioners.

Office and Post Office Address: Temple of Justice, Olympia, Wash.

STATE PRINTING PLANT, OLYMPIA, WASHINGTON

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, A. D. 1946

No.....

MILO MOORE, Director of Fisheries of the State of Washington, and DON W. CLARKE, Director of Game of the State of Washington, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

To the HONORABLE FRED M. VINSON, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent and show:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit in equity, brought in the United States District Court for the State of Washington, Western District, Southern Division, by the United States as trustee for the Quileute Indians to quiet title in the United States to the bed, banks and waters of the

Quileute River and certain tide lands abutting on the Pacific Ocean and to prevent petitioners as state officials from regulating fishing upon the areas in question.

The United States' contention is bottomed upon the premises that in furtherance of Article 2 of the treaty of July 1, 1855 (concluded January 25, 1856) between Governor Isaac I. Stevens and the Quinaielt and Quileute Indians (R. 13-21) Appendix A. President Cleveland on February 19, 1889, promulgated the proclamation and executive order (R-5), Appendix C, 1 Kappler Indian Laws and Treaties, setting aside for the Quileute Indians certain government lots and subdivisions which lands as so described included by *inference* and *implication* the tide and submerged lands and the waters fronting thereon.

As against that contention the petitioners have asserted by way of affirmative defenses: That the Quileute River has been navigable at the points in question from time immemorial and the bed and banks thereof were reserved for the future State of Washington; That by the terms of the proclamation of February 19, 1889 (Appendix C), the lands withdrawn and set aside were expressly delimited and tide or submerged lands were not included; That the case of *Taylor v. United States*, 44 Fed. (2d) 531, 51 S. Ct. 345, 283 U. S. 820, 75 L. ed. 1436, (certiorari denied) involving identical facts became *res judicata* or *stare decisis* and precluded any different result; and, That the terms of Article 2 of the treaty of July 1, 1855 (R. 13-21), Appendix A, were entirely fulfilled by the Presidential Proclamation of November 4, 1873, Appendix B (1 Kappler Indian Laws and Treaties 927), establishing the Quinaielt reservation for the use

and benefit of the Quinaielt, Quileute and other Indians under *United States v. Halbert*, 38 F. (2d) 795, and under the letter of R. A. Ballinger, Secretary of the Interior to the Chairman of Indian Affairs (February 18, 1910) (R. 591-592), Appendix D.

The cause proceeded to trial on the merits before the Honorable Charles H. Leavy, United States District Judge on March 27, 1945, and thereafter on November 20, 1945, said court entered its decree against petitioners. (R. 70-74.)

Petitioners appealed to the United States Circuit Court of Appeals, Ninth Circuit, within the time provided by law and the cause was by that court ordered submitted on September 17, 1946. Thereafter the said circuit court entered and filed its affirming opinion on October 25, 1946, upon which decision petitioners now make application for this writ.

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under section 240 of the Judicial Code, as amended, being section 347a of Title 28 of the United States Code.

The decree of the circuit court was filed and entered October 25, 1946 (R. 678). The time for seeking certiorari began to run from the day said decree was entered, *Boylan v. United States*, 257 U. S. 614, 42 S. Ct. 113, 66 L. ed. 397. This petition is filed within three months after the entry of the decree, as required by section 350 of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Is a prior final decision of a circuit court of appeals, in which the unsuccessful party has sought and been denied writ of certiorari by this court *res judicata* when the subject matter is identical, and exactly the same treaties and proclamations govern the result? The United States was the plaintiff below in each case. In the aforesaid *Taylor v. United States,* 44 Fed. (2d) 531, case, citizens and a political subdivision of the state were defendants claiming under the state's right and title. In this case the state itself is defendant.

2. If such elements do not create *res judicata,* then does the former decision become the law of the case with all elements so disposed of that *stare decisis* will preclude a different subsequent holding by the same court?

3. Where an executive proclamation, made in pursuance of a treaty with an Indian tribe, creates a reservation by precise and specific recitation of certain portions of sections—township and range and certain government lots according to the system of land measurement prescribed by the Surveyor General and General Land Office and mentions nothing more—is the reservation delimited to those identical parcels of land?

4. When a state of facts exists such as those described immediately above in paragraph 3, may a court either reform that instrument which sets aside the reservation or substitute its judgment for that of the President so as to enlarge the proclamation and do now what it thinks the President should have formerly done by including waters and lands which the President excluded?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The subject matter of this controversy has been before the Circuit Court of Appeals for the Ninth Circuit twice and has resulted in conflicting opinions. The right of the United States as trustee for the Quillehute tribe of Indians to exclude citizens of the State of Washington was the sole question in the above mentioned case of *Taylor et al. v. United States,* 44 Fed. (2d) 531. That *Taylor* case held that title to the bed and banks of the Quileute River is in the State of Washington and was a final adjudication and determination of every contention asserted by the government in the present case.

While it is now said that the *Taylor* case was decided upon a mistake of fact, nevertheless that precise issue was presented to this court by the government in its petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit in *United States v. Taylor et al.,* 283 U. S. 820, 51 S. Ct. 345, 75 L. ed. 1436, and this court denied the government's petition for the writ.

The conflict arises from the present holding of the same Circuit Court of Appeals for the Ninth Circuit that the bed and banks of the same Quileute River are not vested in the State of Washington but in the United States of America as trustee for the Quileute Indians.

2. This litigation is waged by the United States against the State of Washington. ("It is admitted the aforementioned Milo Moore and John Biggs are being proceeded against as public officials of the State of Washington and not as private individuals. The contest, therefrom is one between the United States and the State

of Washington") (Op. of District Judge, R. 35.). The case rests solely upon interpretation of a treaty of the United States with the Quileute and other tribes of Indians and two Executive Proclamations promulgated in pursuance of such treaty (Appendices A, B and C). The United States seeks to oust the state from said waters and lands and quiet its own title thereto.

This court has seen fit to grant certiorari in cases where a circuit court of appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. It would seem that the orderly exercise of the police power of the state in its efforts to perpetuate the salmon and insure their access to spawning grounds would be an important question of local law. The restriction of that power which follows from the holding of the circuit court should be reviewed.

In any event and as another reason for the writ, we submit if this decision is not in conflict with the holding of this court in denying certiorari in the *Taylor* case thus affirming the state's title, then it presents an important question of federal law which has not been but should be settled by this court.

Wherefore, your petitioners respectfully pray that a writ of certiorari issue under the seal of this court directed to the Circuit Court of Appeals for the Ninth Circuit commanding said court to certify and send to this court a full and complete transcript of the records and of the proceedings of said Circuit Court in the case numbered and entitled on its docket No. 11281, Milo Moore, Director of Fisheries of the State of Washington and Don W. Clarke, Director of Game of the State of Washington, Appellants, v. United States of America, Appellee, to the

end that this cause may be reviewed and determined by this court, as provided for by the statutes of the United States; that the judgment herein of said Circuit Court of Appeals be reversed; and for such further relief as this court may deem proper.

Dated this 17th day of January, 1947.

Milo Moore, Director of Fisheries of the State of Washington.

Don W. Clarke, Director of Game of the State of Washington.

By: SMITH TROY,
Attorney General,
State of Washington.

HAROLD A. PEBBLES,
Special Assistant Attorney General,
State of Washington.

MAX CHURCH,
Special Assistant Attorney General,
State of Washington.

Attorneys for Petitioners.

The undersigned counsel for petitioners do hereby certify that this petition is well founded and is not interposed herein for delay.

.....
Attorney General,

.....
Special Assistant Attorney General,

.....
Special Assistant Attorney General,

Attorneys for Petitioners.

Appendix A

TREATY WITH THE QUINAULT AND QUILEUTE TRIBES, 1855

Articles of agreement and convention made and concluded by and between Isaac I. Stevens, governor and superintendent of Indian affairs of the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them.

Article 1. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the Pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains; thence southerly with said range of mountains to their intersection with the dividing ridge between the Chehalis and Quiniatl Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning.

Article 2. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permis-

sion of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

Article 3. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. Provided, However, That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and keep up and confine the stallions themselves.

Article 4. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of twenty-five thousand dollars, in the following manner, that is to say: For the first year after the ratification hereof, two thousand five hundred dollars; for the next two years, two thousand dollars each year; for the next three years, one thousand six hundred dollars each year; for the next four years, one thousand three hundred dollars each year; for the next five years, one thousand dollars each year; and for the next five years, seven hun-

dred dollars each year. All of which sums of money shall be applied to the use and benefit of the said Indians under the directions of the President of the United States, who may from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Article 5. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

Article 6. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the

sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor.

Article 7. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Article 8. The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens; and should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision and abide thereby; and if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as is prescribed in this article in case of depredations against citizens. And the said tribes and bands agree not to shelter or conceal offenders against the laws of the United States, but to deliver them to the authorities for trial.

Article 9. The above tribes and bands are desirous to exclude from their reservations the use or arden spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to

said tribes who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine.

Article 10. The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to the children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and to employ a blacksmith, carpenter, and farmer for a term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance to be defrayed by the United States, and not deducted from their annuities.

Article 11. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

Article 12. The said tribes and bands finally agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside on their reservations without consent of the superintendent or agent.

Article 13. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chief, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at Olympia, January 25, 1856, and on the Quinai-elt River, July 1, 1855. (R 13-19.)

Appendix B

EXECUTIVE PROCLAMATION, NOVEMBER 4, 1873, WITHDRAWING CERTAIN LANDS AS A RESERVATION FOR QUINAULT AND QUILEUTE INDIANS

Executive Mansion

November 4th, 1873

In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stat. at Large, Vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory (which tract included the reserve selected by W. W. Miller, Superintendent of Indian Affairs for Washington Territory and surveyed by A. C. Smith, under contract of Sept. 16, 1861) be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast, viz:

Commencing on the Pacific Coast at the Southwest corner of the present reservation as established by Mr. Smith in his survey under contract with Supt. Miller, dated Sept. 16, 1861, thence due East, and with the line of said survey, five miles to the Southeast corner of said reserve thus established, thence in a direct line to the most Southerly end of Quinaielt Lake, thence northerly

around the east shore of said lake to the northwest point thereof, thence in a direct line to a point a half-mile north of the Queetshee river and three miles above its mouth, thence with the course of said river to a point on the Pacific Coast at low-water mark, a half-mile above the mouth of said river, thence southerly at low-water mark along the Pacific to the place of beginning.

U. S. GRANT

(R 148-149)

Appendix C

EXECUTIVE PROCLAMATION OF FEBRUARY 19, 1889, WITHDRAWING AND SETTING ASIDE CERTAIN LANDS AS A RESERVATION FOR QUILEUTE INDIANS

Executive Mansion

February 19, 1889

It is hereby ordered that the following described tracts of land situate in Washington Territory, viz: lots three, four, five and six, section twenty-one; lots ten, eleven and twelve, and the southwest quarter of the southwest quarter section twenty-two; fractional section twenty-seven; and lots one, two and three, section twenty-eight, all in township twenty-eight north of range fifteen west, be and the same are hereby, withdrawn from sale and settlement and set apart for the permanent use and occupation of the Quillehute Indians; Provided, That this withdrawal shall not affect any existing valid rights of any party.

GROVER CLEVELAND.

836.60 acres.

(R 341)

Appendix D

LETTER OF SECRETARY OF INTERIOR TO U. S. SENATE

Department of the Interior
Washington

February 18, 1910

Sir: I have the honor to acknowledge the receipt, by your reference of February 3, 1910, of Senate Bill 5269, Sixty-first Congress, second session, authorizing allotments on the Quinaielt Indian Reservation, in Washington, to members of the Hoh, Quileute, and Ozette Tribes of Indians.

By executive order of November 4, 1873, in pursuance of the treaty of July 1, 1855 (12 Stat. L., 971), there was set aside and reserved for the use of the Quinaielt, Quileute, Hoh, and other tribes of fish-eating Indians of Washington approximately 220,000 acres of land.

Article II of the treaty of 1855, supra, provided that it would be lawful for the members of the several tribes to reside upon any land not in the actual claim and possession of citizens of the United States for a period of one year pending their removal to the diminished reservation. The diminished reservation was not established until 1873, and a number of the Indians who had not removed thereto at that time continued to live on tracts outside of the reservation even after it was established.

To protect these Indians in their holdings off the reservation, executive orders of February 19, 1889, and April 12 and September 11, 1893, set aside and reserved approximately 1 square mile each for the Quileute, Ozette, and Hoh tribes, respectively. These small reservations

are and have been occupied by the Indians in the form of villages and do not contain enough lands to provide allotments for all the Indians thereon. Members of these tribes who moved to and resided continuously on the Quinaielt Reservation were entitled to and received allotments there.

The department is of the opinion, therefore, that those members of the Hoh, Ozette, and Quileute tribes who are residing on the separate reservations set aside for them should receive allotments on the Quinaielt Reservation, and would be glad to see Senate bill 5269 enacted into law.

Very respectfully,

R. A. BALLINGER,
Secretary.

Hon. Moses E. Clapp, Chairman Committee on
Indian Affairs, United States Senate.
(R 591-592)

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 915

MILO MOORE, DIRECTOR OF FISHERIES OF THE STATE OF WASHINGTON, AND DON W. CLARKE, DIRECTOR OF GAME OF THE STATE OF WASHINGTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 34–59) is reported in 62 F. Supp. 660. The opinion of the circuit court of appeals (R. 664–677) is reported in 157 F. (2d) 760.

JURISDICTION

The decree of the circuit court of appeals was entered on October 25, 1946 (R. 678). The petition for a writ of certiorari was filed on January 20, 1947. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the executive order of February 19, 1889, creating the Quillehute Indian Reservation, included therein the part of the Quillehute River which flows through the reservation and the tidal lands in the river and in the Pacific Ocean bordering the reservation.

2. Whether the court below erred in refusing to defer to this Court's denial of certiorari to review a prior holding of the court below that these lands were not within the reservation.

STATEMENT

The decree sought to be reviewed (R. 678) affirms a decree (R. 70–73) enjoining petitioners from exercising any jurisdiction over the fishing activities of the Quillehute Tribe of Indians[1] in the Quillehute River within the confines of the Quillehute Indian Reservation and in the tidal waters of the river and of the Pacific Ocean bordering upon the reservation. The material facts are as follows:

By Article I of a treaty concluded on July 1, 1855, ratified by the Senate on March 8, 1859, and proclaimed by the President the following

[1] The opinion below spells the name as "Quillayute" (see, e. g., R. 664, 665). Petitioners' spelling "Quileute" is also permissible.

April 11 (12 Stat. 971) the Quinaielt and Quillehute Indians ceded to the United States certain lands. Article II of the treaty provided (R. 62):

> There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a *tract or tracts of land sufficient for their wants* within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use * * *. [Italics added.]

On February 19, 1889, the President created the Quillehute Indian Reservation by an executive order. The order declared (R. 63):

> It is hereby ordered that the following-described tracts of land *situate in Washington Territory,* viz: Lots 3, 4, 5, and 6, Section 21; lots 10, 11, and 12, and the southwest quarter of the southwest quarter, Section 22; fractional section 27, and lots 1, 2, and 3, section 28; all in township 28 north, of range 15 west, be, and the same are hereby, withdrawn from sale and settlement and set apart for the permanent use and occupation of the Quillehute Indians * * *. [Italics added.]

On February 22, 1889, the President approved the Act enabling the Territory of Washington to become a State (25 Stat. 676).[2]

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[2] The State was admitted into the Union on November 11, 1889. 26 Stat. 1552.

The Quillehute River, a navigable stream, flows through the reservation. A part of the reservation is bounded by the Pacific Ocean. The executive order made no reference to either river or ocean. The uplands described in the order consist of 594 acres, upon which is located the ancient village which has always been the home of the Quillehute Indians. They are valuable only as a place where the Quillehutes may live and have free and easy access to the waters of the Quillehute River and the Pacific Ocean. Throughout the existence of the tribe, almost the sole means of livelihood of these Indians has been the aquatic life found in these waters (R. 64). Reservation of the uplands alone would not have met the requirements of Article II of the treaty. Without the inclusion of the waters in question, the tract of land described in the executive order was and is wholly insufficient for the wants of the Quillehute Indians (R. 64–65). Between 1854 and 1889, the Quillehutes numbered from 250 to 300; there are now between 175 and 200 of them (R. 151, 180, 207, 261).

On July 6, 1928, the United States brought an action in the United States court for the Western District of Washington to enjoin W. F. Taylor and others from maintaining certain barges in the Quillehute River off the Indian village upon the ground that the barges were located within the reservation in violation of law. The district court

held that the reservation included the bed of the river. 33 F. (2d) 608. The circuit court of appeals reversed. *Taylor* v. *United States,* 44 F. (2d) 531. It held that the executive order setting aside the reservation did not reserve the bed of the river for the Indians. The court said (pp. 534–535):

> These lands and waters had *already* vested in the state by virtue of * * * the transfer thereof to the state by the Enabling Act and its acceptance by the state in its Constitution, subject to the discretionary power of the President under the treaty to reserve the same under the treaty. * * * If we recognize the rule that in grants to Indians uncertainties are to be determined more favorably to them than to the government, we must here recognize that the governmental act is dual in its effect, if so construed, as it takes from the state a right *already* expressly granted to it and reserves it for a political body, not by express grant or reservation, but by mere implication. In other words, so construed, the act of the President extends to a political body, merely because it is a political body, a right which must be taken from another political body to which it has been *already* expressly granted. It would seem more reasonable that the *previous* express grant to a political body would take precedence over the implications which would otherwise arise from the reservation of the upland for an

> Indian tribe. We are inclined to think that the inferences to be derived from the fact that the Quileute Indians for whom the reservation was set apart are overcome by the *prior* express grant of the tidelands and navigable waters to the state. [Italics added.]

This Court denied a petition for certiorari. 283 U. S. 820.

Following this decision, the State of Washington for the first time required the Indians fishing in these waters to comply with all state game and fish laws (R. 542–543). On August 7, 1945, the Government brought this action to enjoin petitioners from such interference with the Indians (R. 1–22). After trial, the district court made findings of fact (R. 59–68) and conclusions of law (R. 68–70), rendered an opinion (R. 34–59), and entered decree granting the relief prayed for (R. 70–73).

The circuit court of appeals affirmed (R. 664–677). It held that the executive order reserved to the Indians the waters in question (R. 672). It declined to adhere to its prior decision in *Taylor* v. *United States,* 44 F. (2d) 531. As it said (R. 674–675:

> As to stare decisis, this court made a controlling error in political history. It based its opinion upon a statement that Washington entered the Union before the reservation was made * * * To such a decision, based upon such an error of fact

judicially to be noticed, the doctrine of stare decisis cannot apply.

ARGUMENT

Upon a careful review of the circumstances attending the making of the treaty and the issuance of the executive order (R. 667–671), the court below concluded that the waters in question were made a part of the Quillehute Indian Reservation and that consequently the fish and game laws of Washington could not apply in these waters (R. 672). Petitioners bring forward nothing to support their assertion (Pet. 4) that the court's construction of the executive order was erroneous.

The burden of petitioners' complaint (p. 7) is that the circuit court of appeals declined to follow its earlier decision in *Taylor* v. *United States,* 44 F. (2d) 531. But, as the court pointed out (R. 674–675) that decision was based on a mistake of fact and did not arise out of litigation between the parties here involved. However, petitioners argue that, because this Court denied the Government's petition for certiorari in the *Taylor* case, the erroneous decision is binding in the case at bar (Pet. 8). The argument is without merit. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States* v. *Carver,* 260 U. S. 482, 490; *Atlantic Coast Line R. Co.* v. *Powe,* 283 U. S. 401, 403–404. Ob-

viously, therefore, the court below was not constrained to perpetuate the error made in the *Taylor* case.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, he denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
DAVID L. BAZELON,
Assistant Attorney General.
JOHN F. COTTER,
Attorney.

FEBRUARY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, A. D. 1946

No. 915

MILO MOORE, Director of Fisheries of the State of Washington, and DON W. CLARKE, Director of Game of the State of Washington, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

BRIEF OF KENNETH R. L. SIMMONS, AMICUS CURIAE AND ATTORNEY FOR THE QUILLAYUTE TRIBE OF INDIANS

KENNETH R. L. SIMMONS,
Attorney for Quillayute Tribe of Indians.

Office and Post Office Address: 221 Fratt Building, Billings, Montana

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SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, A. D. 1946

No. 915

MILO MOORE, Director of Fisheries of the State of Washington, and DON W. CLARKE, Director of Game of the State of Washington, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

BRIEF OF KENNETH R. L. SIMMONS, AMICUS CURIAE AND ATTORNEY FOR THE QUILLAYUTE TRIBE OF INDIANS

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent and show:

STATEMENT

The Quillayute Tribe of Indians has requested Kenneth R. L. Simmons, attorney at law of Billings, Montana, and a member of the bar of the Supreme Court of the United States, to file a brief in the capacity of amicus curiae and

as its attorney, in answer to the petition for writ of certiorari to the United States Circuit Court of Appeals, Ninth Circuit, filed in the Supreme Court of the United States in the above captioned case by Milo Moore, Director of Fisheries of the State of Washington and Don W. Clarke, Director of Game of the State of Washington, through their counsel of record.

The interests of the Quillayute Tribe of Indians are so great in this litigation—their very existence being at stake —(R. 207, 210), that they employed said attorney to appear in the capacity of amicus curiae and attorney for the Quillayute Tribe of Indians in the appeal of said cause and the argument thereof before the United States Circuit Court of Appeals for the Ninth Circuit, Moore v. United States, 157 F. 2d, 760, because of his familiarity with the litigation by reason of his participation in the trial of said cause before the United States District Court for the Western District of Washington, Southern Division, when serving as District Counsel, Office of the Solicitor, Department of the Interior, United States v. Moore, 62 F. Supp. 660.

In pursuance of the provisions of Section 9 of Rule 27 of the Revised Rules of the Supreme Court of the United States, this brief of an amicus curiae is filed, written consents thereto having been obtained from all parties to the case and separately filed with this brief with the clerk of the Supreme Court of the United States.

The position here taken is that the application for writ of certiorari should be denied for reasons set forth in the ensuing argument.

SUMMARY OF ARGUMENT

I

The United States Circuit Court of Appeals for the Ninth Circuit in its decision in the instant case, Moore, Director of Fisheries, State of Washington, et al., v. United States, 157 F. 2d 760, expressly overruled its decision in the case of Taylor et al., v. United States, 44 F. 2d 531, and there are now no conflicting opinions of the United States Circuit Court of Appeals for the Ninth Circuit relating to the subject matter of this controversy.

II

The denial of the government's petition for writ of certiorari by this court in the case of United States v. Taylor, et al., 283 U. S. 820, 51 S. Ct. 345, 75 L. Ed. 436, advances no reason for the granting of a writ of certiorari by this court in the instant case.

III

No new question of federal law arises as a result of this controversy which has not been settled by this court. The decision of this court in the case of Alaska Pacific Fisheries v. United States, 248 U. S. 78, 39 S. Ct. 40, 63 L. Ed. 138, is controlling and determinative of all questions involved.

ARGUMENT

I

The decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case of the United States v. Taylor, 44 F. 2d 521, was based clearly upon a factual error. It is evident that Justice Wilbur, who wrote the opinion, was under the impression that the State of Wash-

ington had been admitted into the Union before the Quillayute Indian reservation was set aside by Executive Order on February 19, 1889, while as an historical fact Washington was not actually admitted until November 11, 1889, and the enabling act, authorizing its admission into the Union, was passed three days after the reservation was created, on February 22, 1889, 25 Stat. 676.

The trial court stated in its opinion, United States v. Moore, 62 F. Supp. 660, 664:

> "An examination of the opinion, however, discloses that the Court did not, in the opinion, review the 'surrounding circumstances,' nor the 'history leading up to the promulgation of the instrument,' but turned its decision of the case upon the 'previously vested rights of a state,' and based it upon the mistaken fact that the creation of the State of Washington was prior to the creation of the Indian Reservation, which resulted in the conclusion that the State had vested rights. This court must consider the facts as made by the proof and determine the rights of the parties based upon such proof."

An examination of the opinion of the United States Circuit Court of Appeals for the Ninth Circuit in the instant case, discloses, without any question, that the Circuit Court recognized its factual error and expressly overruled its decision in the Taylor case, by stating in its opinion, Moore v. United States, 157 F. 2d. 760, 764:

> "As to stare decisis, this court made a controlling error in political history. It based its opinion upon a statement that Washington entered the Union before the reservation was made. As a result of this error our Taylor opinion states, at pages 534, 535, '* * * If we recognize the rule that in grants to Indians uncertainties are to be determined more favorably to them than to the government, we must here recognize that the governmental act is dual in its effect, if so con-

strued, as it takes from the state a right already expressly granted to it and reserves it for a political body, not by express grant or reservation, but by mere implication. In other words, so construed, the act of the President extends to a political body, merely because it is a political body, a right which must be taken from another political body to which it has been already expressly granted. It would seem more reasonable that the previous express grant to a political body would take precedence **over the implications which would otherwise** arise from the reservation of the upland for an Indian tribe. We are inclined to think that **the inferences to be derived from the fact that the Quileute Indians for whom the reservation was set apart** are overcome by the prior express grant of the tidelands and navigable waters to the state.' (Emphasis supplied.) To such a decision, based upon such an error of fact judicially to be noticed, the doctrine of stare decisis cannot apply. We have considered 'the inferences to be derived from the fact that the Quileute (Quillayute) Indians for whom the reservation was set apart' in view of the fact that the state was admitted to the Union **after** the land was set apart to the Indians, and have come to the above conclusion."

It is submitted that there are no conflicting opinions of the United States Circuit Court of Appeals relating to the subject matter of this controversy. The subject matter of this controversy, as stated by the United States Circuit Court of Appeals for the Ninth Circuit, 157 F. 2d., 760, 762, is:

> "Whether in creating the reservation the United States reserved only the bed of the river at its mouth and the adjoining ocean beach lands, or did it reserve the river's bed for the remaining area within the upland of the reservation and the Pacific tidal waters on the ocean side of the barren sandspit?"

In the Taylor case the question involved was whether the State of Washington held title to the bed of a navigable

stream by virtue of its statehood, which bed of the Quillayute River had or had not been set aside prior to the admission of Washington into the Union. The Circuit Court of Appeals had the courage to admit its factual error which controlled its decision.

II

The fact that this court denied the government's petition for writ of certiorari in the case of United States v. Taylor, et al, can have no bearing whatsoever upon the action taken by this court in the consideration of the present application for a writ of certiorari. In the Taylor case the record failed entirely to disclose the circumstances of the case; that is to say, the conditions of the Quillayute Indians at the time the Executive Order was issued on February 19, 1889, by President Cleveland establishing the reservation. As the trial court stated in referring to the opinion of the United States Circuit Court of Appeals in the Taylor case, 62 F. Supp. 660, 664:

> "An examination of the opinion, however, discloses that the Court did not, in the opinion, review the 'surrounding circumstances,' nor the 'history leading up to the promulgation of the instrument,' but turned its decision of the case upon the 'previously vested rights of a state,' * * * * This court must consider the facts as made by the proof and determine the rights of the parties based upon such proof."

All of this evidence as to the surrounding circumstances and history of the Quillayutes was before the trial court and the Circuit Court in the instant case.

III

No new question of federal law not settled by this court arises out of this controversy. The principles recognized

in the case of Alaska Pacific Fisheries v. United States, 248 U. S. 88, 39 S. Ct. 41, are absolutely controlling in determining the intent of the grantor as to the lands and waters set aside by the Executive Order of February 19, 1889. The United States Circuit Court of Appeals for the Ninth Circuit, in its opinion, stated, 157 F. 2d., 760, 762:

> "We consider the principles recognized in the Alaska Pacific Fisheries case as controlling here. There, in determining the purposes of the reservation of the Annette Islands with reference to the sufficiency of the wants of the Metlakahtla Indian Tribe, the primary purpose was stated to be to aid the Indians who were 'largely fishermen and hunters accustomed to live from the returns of those vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a **promising** opportunity for industrial and commercial development.' (Emphasis supplied.) Alaska Pacific Fisheries v. United States, supra, 248, U. S. 88, 39 S. Ct. 41."
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> * * * * "It is the consideration of such circumstances which determines the government's intent in making a reservation, whether by a Congressional Act as in the Alaska Fisheries case or a departmental reservation as in our decision in United States v. Walker River Irrigation District, 9 Cir., 104 F. 2d, 334, 335."
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> "We think President Cleveland, for the protection and expansion of their established industries, intended and did reserve to these Indians the sandspit, including its tidal lands, and the bed and waters of the Quillayute River, not only by the express reservation of its mouth, but also for the mile upwards from its mouth enclosed by the reservation lands, and that this area is not one to which apply the fish and game laws of the State of Washington. Cf. Donnelly v. United States, 228 U. S. 243; 33 S. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710; Heckman v. Sutter, 9 Cir., 119 F. 83, 89; United States v. Romaine, 9 Cir. 255, F. 253, 259."

There can be no more question here than in the Alaska

Pacific Fisheries case that it was clearly the intent of Congress as well as the President to include the submerged lands and waters in the legislative grant and Executive Order; otherwise the terms of the grant and the Executive Order would have been meaningless. The Quillayute Indians without the submerged lands and adjacent waters could not possibly exist. Their condition was and always has been many times more pitiful than that of the Metlakahtla Indians. Congress as well as the President clearly had power to include the adjacent waters and submerged lands in the reservation without expressly so stating in the grant or order. The words of this Court in the Alaska Pacific Fisheries case, 248 U. S. 78, 87; 39 S. Ct. 41, leave no room for argument on this proposition:

> "That Congress had power to make the reservation inclusive of the adjacent water and submerged lands as well as the uplands needs little more than statement. All were the property of the United States within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. National Bank v. County of Yankton, 101 U. S. 129, 133, 25 L. Ed. 1046; Shively v. Bowlby, 152 U. S. 1, 47-48, 58, 14 Sup. Ct. 548, 38 L. Ed. 331; United States v. Winans, 198 U. S. 371, 383, 25 Sup. Ct., 662, 49 L. Ed. 1089. The reservation was not in the nature of a private grant, but simply a setting apart,' until otherwise provided by law,' of designated public property for a recognized public purpose—that of safe-guarding and advancing a dependent Indian people dwelling within the United States. See United States v. Kagama 118, U. S. 375, 379, et seq., 6 Sup. Ct. 1109, 30 L. Ed. 228; United States v. Rickert, 188 U. S. 432, 437, 23 Sup. Ct. 478, 47 L. Ed. 532."

It is respectfully submitted that the application of the petitioners for writ of certiorari should be denied.

Dated at Billings, Montana, this 5th day of February, 1947.

KENNETH R. L. SIMMONS
As Amicus Curiae and Attorney
for the Quillayute Tribe of Indians.